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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 659

STATE OF WISCONSIN,
Petitioner,

v.

MILWAUKEE BRAVES, INC., ET AL.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

Questions Presented

1. Whether regulation by Wisconsin under its antitrust laws of the structural aspects of the nationwide business of organized baseball would so burden and discriminate against interstate commerce as to violate the Commerce Clause?

2. Whether such state regulation would be in conflict with the national policy manifested by the decisions of this Court in *Toolson* v. *New York Yankees, Inc.*, 346 U. S. 356 (1953), and *Radovich* v. *National Football League*, 352 U. S. 445 (1957), and by the long and continuing consideration by Congress of the antitrust status of baseball and its continuing acquiescence in baseball's immunity from the federal antitrust laws?

Statement of the Case[1]

Proceedings Below

The case here presented can be briefly stated.[2] After extended consideration,[3] the National League in November 1964 granted the request of the Milwaukee Club (Braves) to transfer its operations to Atlanta effective for the 1966 baseball season. No lease or commitment of any character bound the Braves to Milwaukee beyond 1965. This action was filed in August 1965 in the Circuit Court of Milwaukee County (R. 2). A judgment[4] in favor of the petitioner was entered on May 5, 1966 (App. 275e) which in effect (1) enjoined the Braves from playing their home games

1. References to "R. " are to the certified record. References to "Ex. " are to exhibits in evidence. References to "Pet. " are to the Petition for a Writ of Certiorari. References to "App. " are to the separate Appendix to the Petition..

2. Petitioner devotes most of its Statement of the Case (Pet. 5-15) to arguments that respondents' conduct in moving the Milwaukee franchise to Atlanta was unreasonable under the Wisconsin antitrust laws. The reasonableness of respondents' conduct is not before the Court on this petition, since the Wisconsin Supreme Court did not decide that question (App. 24a). It is therefore unnecessary for us to challenge here the many inaccuracies in petitioner's statement and in the trial court's findings referred to therein. However, the petition so distorts the history of the Braves in Milwaukee that we have summarized that history as established by evidence at the trial (*infra*, pp. 6-8).

3. Ex. 9, 10, 12, 69, 96; R. 2387-8, 6028-32, 6037, 6169-73, 7521-5, 7870-89.

4. The trial court decision includes findings of fact and conclusions of law, all of which (except for the addition of Finding 45 and Conclusions of Law 9-12) were mechanically adopted verbatim from the proposed findings and conclusions of petitioner. Respondents' own proposed findings and conclusions were ignored and respondents were given no opportunity to comment on those submitted by petitioner. The Wisconsin Supreme Court set the trial court findings and conclusions out in part in its opinion (App. 5a-16a) without adopting them.

elsewhere than in Milwaukee after May 18, 1966 (although they had already commenced the 1966 season in Atlanta), unless, before May 16, 1966, the respondents submitted a "satisfactory" plan for a new franchise, (2) provided that the Braves perform their home games in Milwaukee under the supervision of the trial court and a board or commission to be appointed by the court, (3) required respondents to grant a franchise for an eleventh National League club in Milwaukee and to take the steps necessary to facilitate its operation in 1967, including the adoption of an equitable plan for supplying players, and (4) required respondents to pay forfeitures totalling $50,000 and costs.

On July 27, 1966 the Wisconsin Supreme Court reversed the trial court judgment for lack of jurisdiction of the subject matter and dismissed the complaint (App. 281f).

Evidence Relating to Jurisdiction

Critical to the jurisdictional question and to the Commerce Clause and national policy questions upon which it is based is the nearly 100-year old structure of organized baseball. The evidence with respect to this structure is as follows:

The National League and the American League of Professional Baseball Clubs are known as the Major Leagues (R. 5, 6). The National League consists of 10 member clubs in eight states (Ex. 1, pp. 19-21). The American League consists of 10 member clubs in nine states and the District of Columbia (Ex. 1, pp. 5-7). The Major Leagues, their member clubs, the National Association of Professional Baseball Leagues (the association of the minor leagues) and the 19 minor leagues and their members constitute what is generally known as "organized baseball" (R. 5867-8). In 1965 minor league clubs were

located in 26 states and in Mexico and Canada and 13 of the minor leagues operated in more than one state (Ex. 1, pp. 201-73).

"Organized baseball" is organized by a series of agreements and rules which provide for a national administration, the organization and classification of leagues, the distribution, geographical location and number of franchises, handling, selection, assignment and reservation of player contracts, eligibility of players, equalization of competitive playing strengths, uniformity of play, and preservation of the honesty and integrity of the game and public confidence therein. The pertinent agreements and rules are stated in the Official Baseball Blue Book (pp. 501-657) which is Exhibit 1 in this case. Each league has adopted a constitution and rules governing relations among the members of the league (R. 5859). The National League Constitution provides that a vote of three-fourths of the members is required to permit the change of a club's location and unanimous consent is required for an increase in League membership (Ex. 3, Article 3.1).

The 1965 Senate Hart Report[5] said with full cognizance of the Milwaukee situation[6] and the National League Constitution:

> "The present system within organized baseball which requires a vote of the league or leagues before moving a franchise is a means of insuring

5. Senate Judiciary Committee Report on Professional Sports Act of 1965, S. Rep. No. 462, 89th Cong., 1st Sess., 13 (1965), hereinafter referred to as "1965 Senate Hart Report", included in evidence as Ex. 526.

6. Robert P. Russell, corporation counsel for Milwaukee County and a signer of the petition, sought in 1965 to persuade Senator Hart to bring baseball under the antitrust laws without exempting the structural arrangements (Ex. 255, p. 1). His efforts were unavailing and S. 950 was passed by the Senate with the structural exemptions included shortly after this action was commenced. See *infra*, p. 15.

> geographic balance among the teams. But further it has the potential to prevent franchise moves made without a compelling reason. If present antitrust laws were applied with full vigor there would be no means of preventing any team from moving anywhere at any time. Therefore this exemption should have the result of braking rather than accelerating franchise moves."

The Commissioner of Baseball, whose office is created by the Major League Agreement (Ex. 1, p. 501), is the central figure in the organization of baseball. His office and the various league structures exist because of the need to govern and administer organized baseball in a nationally uniform manner, undisturbed by local variations, and the need to guarantee the absolute integrity of every aspect of the operation and play of the game (R. 5870-1). Professional baseball could not exist without such a structure to provide competition between clubs and leagues on a regular basis and to provide a framework for the adoption and enforcement of rules which protect the public and preserve the integrity and uniformity of the game (R. 5890-1, 5919).[7]

These jurisdictional facts constitute and will be referred to throughout this brief as the "structural arrangements" or "aspects" of organized baseball, that is, those essential sports practices which are vital to the operation and survival of organized baseball. It is unnecessary completely to define all such practices, and this statement of facts does not undertake to do so, since those directly

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7. 1965 Senate Hart Report at 14-15; Subcommittee on the Study of Monopoly Power of the House Judiciary Committee Report on Organized Baseball, H.R. Rep. No. 2002, 82nd Cong., 2d Sess., 7, 228-29 (1952), hereinafter referred to as "1952 House Report", included in evidence as Ex. 7.

involved in this case (control of franchise locations and players) are clearly essential.

The need for uniform regulation and the practical impossibility of state regulation were spelled out in the 1952 House Report (p. 7):

> "Pragmatically, organized baseball is not amenable to effective State regulation. As stated above, most baseball leagues include cities in more than one State. These 52 leagues, in turn are combined in an association which embraces 42 States and six foreign countries. Individual games, while conducted wholly within a State, are inseparable elements of the larger pennant race, which is dependent for its success upon interstate activities. Baseballs, bats, player uniforms, and other paraphernalia are purchased through the channels of interstate commerce. Team personnel in traveling from one city to another to complete the playing schedule must use railroads, airplanes, or other means of interstate commerce.
>
> "Equality of competition among clubs within the same league requires equality of the fundamental conditions under which they operate, particularly in the acquisition of players who create baseball contests. For the past 75 years, organized baseball has provided this uniform regulation itself without substantial State or Federal interference.
>
> "After full review of all of the foregoing facts and with due consideration of modern judicial interpretation of the scope of the commerce clause, it is the studied judgment of the Subcommittee on the Study of Monopoly Power that the Congress has jurisdiction to investigate and legislate on the subject of professional baseball."

The History of the Braves in Milwaukee

In the early 1950's, Milwaukee County built a Major League type baseball stadium on the speculation that a

Major League club could be induced to move to Milwaukee from another city (Ex. 164). The County succeeded in attracting the Boston Braves of the National League for the 1953 season (Ex. 164). A five year lease was signed (Ex. 248). Efforts thereafter of the Braves to obtain a longer-term lease on the same terms were unsuccessful and another five year lease was signed for 1958-62 and a three year lease for 1963-65 (Ex. 120, 247; R. 3841). In other National League cities where publicly owned stadia are leased by National League clubs, the lease periods are New York 30 years, Atlanta 25 years, St. Louis 30 years, Houston 40 years, San Francisco 35 years, Philadelphia 30 years (Ex. 246). Attendance at the outset was outstanding and continued to climb through 1957 when the Braves won the pennant. Thereafter, attendance plummeted notwithstanding a pennant winner in 1958, a tie for first in 1959, winning baseball in all seasons, perennial first division finishes (except 1963—6th place) and one of the most exciting teams in baseball (Ex. 176-85, 93-5). During the five years 1961-65, Milwaukee had the worst average attendance in the National League (even omitting the low 1965 attendance from the Braves average) (Ex. 506, p. 32), save only the Chicago Cubs, a club which has not finished in the first division for twenty years and is the only team in the Majors without lights for night baseball (Ex. 245; R. 5975). The attendance situation, combined with (1) operating losses in 1963 and 1964 (Ex. 14-15) and the prospect of continuing losses (Ex. 10), (2) inadequacy of the television market (confined by Lake Michigan to the east, Chicago to the south and the territory of the Minnesota Twins to the north and west—the latter commencing in 1961) (Ex. 510, p. 6), (3) a hostile county government (e.g., public challenges by the chairman of the county board concern-

ing the integrity of the Braves' players, manager and owners (Ex. 90, 404; R. 6440-1)), and (4) other serious operating impediments such as a fiercely hostile press (Ex. 10; R. 4383-410), left the Braves with no alternative but to seek a new playing location. Moreover, the National League, in granting permission, considered the fact that the Wisconsin area had plentiful access to Major League baseball through the Chicago Cubs, Chicago White Sox and Minnesota Twins (Ex. 10). The decision to transfer did not occur until after the Braves had made unprecedented efforts to improve the situation in Milwaukee (Ex. 111; R. 6035-6, 6883-910), a private offering to community leaders of a substantial ownership interest in the Braves had utterly failed (R. 6845-62) and a public offering to Wisconsin residents of 36% of the Braves outstanding common stock (at the price paid by the Braves) had resulted in sales of 4% (Ex. 13; R. 6863-74). At no time did anyone in Wisconsin make a money offer to purchase the club from the respondent Braves (R. 6935-6). Prior to the decision of the National League to transfer the Braves to Atlanta, the County of Milwaukee and leading Milwaukee citizens were endeavoring to attract the Cleveland Indians and Kansas City Athletics of the American League to move to Milwaukee (Ex. 150-1, 441, 490; R. 3827-9). The trial court condemned such conduct (App. 92b) but nevertheless found the Milwaukee Brewers Baseball Club, Inc., a corporation formed in July 1965 (Ex. 29), of which several of the same citizens were founders and stockholders (App. 92b; Ex. 443; R. 7644-5), qualified to receive the expansion franchise the court ordered the respondents to grant (App. 278e).

ARGUMENT

The petition presents no federal question of substance and seeks an application of the Wisconsin antitrust laws in conflict with the Commerce Clause and national policy. The decision of the Wisconsin Supreme Court is in accord with applicable decisions of this Court.

The Wisconsin Supreme Court correctly held that the State's antitrust law cannot be applied to regulate "the very fabric" of the interstate business of baseball (in this case the number and location of clubs and allotment of players), because to do so would conflict with national policy and, in violation of the Commerce Clause, would regulate aspects of the interstate business which require uniformity of regulation (App. 21a, 37a-39a).

That the business of organized baseball is interstate commerce is recognized by the decisions of this Court in *Toolson* v. *New York Yankees, Inc.*, 346 U. S. 356 (1953) and *Radovich* v. *National Football League*, 352 U. S. 445 (1957),[8] by Congress[9] and by the majority and dissenting opinions of the court below (App. 24a, 43a). The business is unique in that the clubs in each league must act as partners as well as competitors and must adopt and operate under a system of structural rules and regulations which would be entirely inappropriate in an ordinary industry and as to which the application of conventional antitrust principles would be both inappropriate and destructive of the public interest in the game. See 1965 Senate Hart Report at 12; 1952 House Report at 229. These structural

8. The history of baseball's immunity from the federal antitrust laws, commencing with *Federal Baseball Club of Baltimore* v. *National League*, 259 U. S. 200 (1922), and the pertinent language of the cases are fully set forth in the majority opinion below (App. 27a-31a) and need not be repeated here.

9. See 1965 Senate Hart Report at 4-6; 1952 House Report at 4-7.

arrangements are essential to the national commerce of baseball which requires by its very nature a national uniformity of regulation by a single regulating authority. See *California* v. *Zook*, 336 U. S. 725, 728 (1949); *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 767-68 (1945).

Whether or not the long recognized distribution of power between the national and state governments, as to subjects requiring national uniformity and those admitting of local regulation, is predicated upon (1) the "implications of the Commerce Clause itself" or (2) upon the "presumed intention of Congress where Congress has not spoken" (by enacting legislation),[10] the result in this case is the same.[11]

As to the implications of the Commerce Clause, the burden which would be imposed by Wisconsin on the baseball commerce by disrupting its national uniformity of regulation is clear and is not directly, if at all, disputed by the petition or by the dissenting opinion below (App. 49a).

As to the presumed intention of Congress and the national policy which it manifests, these are evidenced by the very extensive Congressional activity (Congressional hearings, reports, acts and bills) with respect to baseball and league sports over the past 15 years[12] and the decisions of this Court in *Toolson* and *Radovich* holding that the business of baseball is not subject to the federal antitrust laws unless and until Congress determines otherwise.[13] This Court has recognized that the applica-

10. *Southern Pacific Co.* v. *Arizona, supra* at 768.

11. The Wisconsin Supreme Court recognized both bases for its decision (App. 37a-38a) as had this Court in *Southern Pacific, supra* at 767-68 and *Zook, supra* at 728, both Commerce Clause cases.

12. See 1965 Senate Hart Report at 6-11.

13. The policy of the sovereign may be expressed by its judiciary as well as by its legislature. *Hughes* v. *Superior Court of California*, 339 U. S. 460, 466 (1950).

tion of the federal antitrust laws to baseball by judicial decision would have devastating effects on the baseball business and has declared that in *Toolson* it continued to hold the umbrella over baseball because it foresaw such harm through a flood of litigation and harassment. *Radovich* v. *National Football League*, 352 U. S. 445, 450-52 (1957). It is just as clear that judicial application to baseball of state antitrust laws (which have never been so applied) would have an even more devastating effect and would destroy the baseball business which the *Toolson* umbrella is designed to protect.

From these decisions and the resulting Congressional consideration of baseball, a national policy emerges clearly with which Wisconsin's attempted regulation is in direct conflict: the unique self-regulatory system of baseball (which is broadly assaulted by Wisconsin in this case) should be free of antitrust regulation, state or federal, until such time as Congress elects to modify baseball's immunity. Though assured by this Court in *Radovich* of its Constitutional power to modify or eliminate this immunity (352 U. S. at 452), Congress has not seen fit to do so, notwithstanding careful study of the baseball industry and its demonstrated readiness to enact legislation regarding league sports when deemed in the public interest. See pp. 15-16, *infra*.

We do not contend that the business of baseball is totally free from the application of state antitrust laws. We make no claim, for instance, that state antitrust laws could not apply to an agreement among competing food, concession or novelty sellers, including a baseball club seller, to maintain prices. We do contend, however, that organized baseball's fundamental structural arrangements are outside the scope of state antitrust laws, as well as the federal antitrust laws.

There has been no misinterpretation of *Toolson* which requires review. Like *Toolson* and in complete accord with it, the decision below is strictly limited to baseball and leaves to Congress the determination of baseball's antitrust status.

Petitioner's Argument

The contentions of the petition are:

1. The Commerce Clause cannot bar regulation of baseball because of a mere possibility of conflict with other states (Pet. 33-37).

2. The decision below is a formidable obstacle to state antitrust enforcement generally (Pet. 17-18).

3. An "exemption" from the federal antitrust laws cannot carry with it a "preemption" of state antitrust laws (Pet. 19-25).

4. There is a national policy that states may apply their antitrust laws to baseball (Pet. 25-32).

We deal with these arguments in turn.

1. The Commerce Clause and national policy bar state regulation of the structural aspects of organized baseball.

Petitioner's Commerce Clause argument is concerned solely with the possibility of conflict with other states and ignores the express bases for the decision below. As held below, the Commerce Clause and national policy arguments require consideration of the (1) intent of Congress respecting baseball, (2) the decisions of this Court respecting baseball from which the Congressional consideration of baseball springs and (3) the nature of the burden on baseball commerce sought to be imposed by Wisconsin.

Southern Pacific Co. v. *Arizona,* 325 U. S. 761 (1945), presents a striking parallel to the present case because the subject matter required national uniformity of regulation and because of Congress' consideration of the subject matter and continuing statutory silence. This Court held the Arizona Train Limit Law unconstitutional, recognizing that the length of interstate trains must be regulated, if at all, on a uniform basis from state to state and that no one state—only Congress—could prescribe this regulation. Congress, as this Court noted (325 U. S. at 766), had refused to prescribe train lengths. This Court held (325 U. S. at 767-68, 779-80):

> "But ever since *Gibbons* v. *Ogden,* • • • the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority • • •. Whether or not this long recognized distribution of power between the national and the state governments is predicated upon the implications of the commerce clause itself • • • or upon the presumed intention of Congress, where Congress has not spoken, • • • the result is the same.
>
> • • • • • •
>
> "The principle that, without controlling Congressional action, a state may not regulate interstate commerce so as substantially to affect its flow or deprive it of needed uniformity in its regulation is not to be avoided by 'simply invoking the convenient apologetics of the police power,' • • •." (Citations omitted.)

The requirement of national uniformity may very well result in subjects which are free of all regulation (federal or state), as were train lengths in *Southern Pacific,* at

least until Congress asserts its regulatory power.[14] There is a long line of authority in this Court for the proposition that states may not regulate subjects of interstate commerce requiring national uniformity of regulation.[15] Of course, Congress may determine that such commerce should be subject to local regulation and so declare. *E.g.*, *In re Rahrer*, 140 U. S. 545, 549 (1891).

As to required national uniformity of regulation, *Southern Pacific* directs us to "the implications of the Commerce Clause" and to "the presumed intention of Congress where Congress has not spoken."[16] Congressional consideration of baseball has been intense following the express referral of the baseball antitrust status to Congress in the *Toolson* and *Radovich* cases.

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14. See also *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 479 (1939); *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U. S. 298, 310 (1924); *Minnesota Rate Cases*, 230 U. S. 352, 396-97 (1913); Ribble, *State and National Power Over Commerce*, p. 212 (Columbia University Press 1937).

15. *Morgan* v. *Virginia*, 328 U. S. 373, 377-78 (1946) (bus segregation); *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 767 (1945) (train lengths); *Edwards* v. *California*, 314 U. S. 160, 172, 176 (1941) (indigents); *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U. S. 298, 308 (1924) (natural gas); *Leisy* v. *Hardin*, 135 U. S. 100, 108-110 (1890) (alcoholic beverages); *Hall* v. *DeCuir*, 95 U. S. 485, 489 (1877) (riverboat segregation); *Welton* v. *Missouri*, 91 U. S. 275, 280 (1875) (licensing of peddlers selling interstate products); *Cooley* v. *The Board of Wardens*, 53 U. S. (12 How.) 299, 319 (1851) (recognized principle).

16. 325 U. S. at 768. As to the importance of Congressional intent and silence in Commerce Clause cases, see opinion below (App. 37a); *Head* v. *New Mexico Board*, 374 U. S. 424, 430 (1963); *California* v. *Zook*, 336 U. S. 725, 728, 731 (1949); *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U. S. 507, 521 (1947); *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 421-33 (1946); Bikle, *The Silence of Congress*, 41 Harv. L. Rev. 200 (1927) ("The silence of Congress in respect to a matter of national concern is interpreted by the Court as evidence of its will that the matter shall not be regulated by the states" (p. 220-21)).

Legislative Consideration of Baseball

For the last 15 years Congress has had organized baseball under almost constant scrutiny. In 1951 extensive hearings covering many weeks were held by the Subcommittee on the Study of Monopoly Power of the House Judiciary Committee. The 1952 House Report rejected state regulation of baseball in language quoted above at page 6 and further recognized the unique nature of the baseball industry,[17] as did the court below (App. 21a-22a).

In response to this Court's 1957 statement in *Radovich* that "the orderly way to eliminate error or discrimination, if any there be, is by legislation and not by court decision" (352 U. S. at 452) legislation has been considered regarding the antitrust status of baseball in every subsequent Congress.

This legislative history was reviewed in detail in the 1965 Senate Hart Report (pp. 6-11). It was there noted (p. 9) that the House in 1958 passed H.R. 10378,[18] exempting from the antitrust laws certain specific aspects of the organized team sports of baseball, football, hockey and basketball, including player control regulations and the right to operate within specified geographic areas. The companion bill in the Senate was tabled on August 1, 1958. On August 31, 1965 the Senate passed S. 950,[19] the Professional Sports Act of 1965, the exemption provisions of which are nearly identical with those of H.R. 10378. This bill was not considered in the House prior to adjournment of the 89th Congress in October 1966.

17. 1952 House Report at 229.

18. H.R. 10378, 85th Cong. 2d Sess. (1958).

19. S. 950, 89th Cong., 1st Sess. (1965), included in evidence as Ex. 525.

In the 1961 Sports Television Act,[20] Congress granted the four organized professional team sports an explicit exemption from the antitrust laws in respect to certain television contracts and specifically provided that the statute should not be deemed to change the applicability or nonapplicability of the antitrust laws to any activity by persons engaged in these team sports, except the television agreements to which the statute applied, thus clearly preserving baseball's status under *Toolson*. Congressman McCullough, in explaining the bill before the House (107 Cong. Rec. 20,062, Sept. 18, 1961), stated that the Act would not affect the different treatment of baseball and football under the antitrust laws.

In October 1966, Congress enacted an amendment to the 1961 Sports Television Act by exempting the June 1966 merger agreement between the National Football League and the American Football League from the federal antitrust laws.[21] The amendment further prohibits certain professional football telecasts which would conflict with the playing of high school football games. This current legislation demonstrates Congress' readiness to deal with particular sports situations which it feels require legislation.

The Burden on Commerce

The complaint in this case attacks not merely the removal of the Braves' franchise to Atlanta, but the entire structure of organized baseball, player control arrangements and its disciplinary practices (R. 8-12).[22] The

20. 75 Stat. 732 (1961), 15 U.S.C. §§1291-95.

21. H. R. 17607 (§6), 89th Cong., 2d Sess. (1966).

22. Counsel for petitioner have been frank to admit that ultimate relief, in the event they prevail, may require restructuring of baseball, modification of its rules or, in the event such structural changes are unsuccessful, baseball's destruction (R. 819, 1192). The petition attacks the reservation of players (Pet. 9, and n. 6).

conclusions of law of the trial court fully accepted the petitioner's sweeping contentions (App. 198b-199b).

The judgment of the trial court goes, in the language of the Wisconsin Supreme Court, to "the very fabric of the organization of commercial baseball" (App. 21a), dealing as it does with the Braves' return from Atlanta and expansion of the National League to 11 clubs.

As to the return of the Braves from Atlanta, the petition (p. 13 n. 15) concedes that the Wisconsin Supreme Court held the trial court's judgment in this regard erroneous under state law (App. 25a). Since to this extent the Wisconsin Supreme Court decision is based upon an independent and adequate state ground, the return of the Braves is no longer an issue in this case.

The requirement of expansion unreasonably burdens and discriminates against commerce for the following reasons:

1. It would discriminate against the interstate baseball commerce for the benefit of local Milwaukee businesses[23] (such as hotels, motels, restaurants, food suppliers and the local businessmen who control the Milwaukee Brewers, the expansion applicant approved by the trial court) which allegedly have been injured by the loss of major league baseball (Pet. 11; Ex. 240, pp. 79-82; R. 13). The court below recognized the purpose of petitioner in this action is "preserving business activity within its borders" (App. 26a). This effort to benefit local business at the expense of interstate commerce is prohibited discrimination against that commerce within the meaning of the leading

23. Since expansion would require the defendants to transfer valuable player contracts and other property rights to a private business in Milwaukee, it would constitute an unconstitutional taking of private property rights. *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U. S. 239, 251 (1905); *Missouri Pacific Ry.* v. *Nebraska*, 164 U. S. 403, 417 (1896).

authorities. *Hood & Sons* v. *DuMond*, 336 U. S. 525, 538-39 (1949); *Toomer* v. *Witsell*, 334 U. S. 385, 403-04 (1948); *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 522-23 (1935); *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1, 13 (1928); *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 597 (1923); *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229, 254-55 (1911).[24] The use of police power is upheld if the subject matter is one which may be appropriately regulated in the interest of the health, safety, welfare and morals of the citizens of the state (*Mugler* v. *Kansas*, 123 U. S. 623, 661 (1887)) and is one "which, because of its local character, and the practical difficulties involved, may never be adequately dealt with by Congress." *Parker* v. *Brown*, 317 U. S. 341, 362-63 (1943). Obviously, these standards are not met in this case. Attenuated theories of benefit to the public interest through economic well-being as justifying exercise of police power have been rejected by this Court. *Head* v. *New Mexico Board*, 374 U. S. 424, 428, n. 4 (1963);

24. Petitioner relies on *Huron Portland Cement Co.* v. *City of Detroit*, 362 U. S. 440 (1960) and *Head* v. *New Mexico Board*, 374 U. S. 424 (1963) for the proposition that state regulation of interstate commerce is permissible in the absence of discrimination or disruption of required uniformity (Pet. 34). Both discrimination and disruption *are* involved in the instant case. Moreover, in *Huron* there was a federal statute which expressly authorized the state to regulate the commerce involved. *Huron* held a Detroit smoke abatement ordinance valid as applied to passing ships in light of a federal statute (69 Stat. 322 (1955), 42 U. S. C. §1857) authorizing the states to act with respect to air pollution and declaring that subject to be a matter of state and local concern. In *Head* this Court upheld a New Mexico law prohibiting newspaper and radio advertising by optometrists, an obvious matter of local concern traditionally within the police power of the state to protect the public health. Moreover, the expressed policy of the Federal Communications Commission was that radio advertising contrary to state law on subjects relative to health, safety and morals, is not to be treated by the Commission as being in the public interest. 374 U. S. at 432, n. 11.

Baldwin v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 522-23 (1935).

2. It would require the other ten National League clubs to change their present interstate operations and to travel regularly to Milwaukee to play the Brewers.[25]

3. It would require the other ten National League clubs, at the very least, to transfer existing valuable player contracts to the Brewers, thereby depriving the interstate commerce operating in the present eight National League states of those property rights, having a value in excess of six million dollars (R. 7223-7).[26]

4. It would, in the language of the court below, "directly affect defendants' operations outside the state" (App. 25a) and subject the other ten clubs to irreparable injury by forcing them to operate as an 11-club league which is shown by the evidence to be neither feasible nor practical.[27] Alternately, it might force expansion to 12 teams in each Major League which petitioner's witness Veeck testified would be necessary (R. 4644). This would multiply the burden of supplying players for a one club expansion four times and would injure the baseball business by seriously diluting the player supply (R. 7530, 7982).

5. It would disrupt the present self-regulatory system of baseball as it relates to player control and franchise location and substitute the judgment and continuing supervision of the trial court (App. 279-280e).

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25. See majority opinion below (App. 25a).

26. See majority opinion below (App. 25a).

27. Every baseball expert who testified at trial rejected an 11-club league as unfeasible as an operating matter, including petitioner's expert Bill Veeck (R. 4644, 6144-5, 6356-7, 7536). Petitioner's effort to imply to the contrary (Pet. 8) is inaccurate.

6. It would conflict with a clear national policy that baseball should be permitted to regulate itself until such time as Congress may determine otherwise.

Obviously, the League could not operate under the kind of regulation imposed by the judgment, particularly where the subject matter would make local objectivity doubtful (App. 39a).

Possibility of Conflict

Petitioner argues that the Commerce Clause cannot bar the attempted regulation of baseball because of the mere possibility of conflict with other states (Pet. 33-37). The court below did not limit its holding to this point and petitioner's cases (Pet. 36) do not support the argument, since they simply do not involve a possibility of conflict threatening a subject matter requiring uniform national regulation.[28] Additionally, petitioner's argument is refuted by the following legal principles:

1. It is not necessary to prove conflict or likelihood of conflict in order to establish that state regulation is a burden on commerce. This is demonstrated by the dis-

28. *Head* v. *New Mexico Board*, 374 U. S. 424, 429 (1963) ("The appellants have pointed to no regulations of other States imposing conflicting duties, nor can we readily imagine any."); *Colorado Anti-Discrimination Commission* v. *Continental Airlines, Inc.*, 372 U. S. 714, 721 (1963) (Colorado anti-discrimination statute applied to the hiring of airline pilots; conflict impossible because any state statute requiring discrimination would be void under Fourteenth Amendment); *Huron Portland Cement Co.* v. *City of Detroit*, 362 U. S. 440, 448 (1960) (smoke abatement ordinance upheld; conflict impossible because ship need only conform to state pollution law with highest standards); *Bibb* v. *Navajo Freight Lines*, 359 U. S. 520, 529 (1959) (involved an actual conflict); *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U. S. 507, 521-23 (1947) (the probability of conflict was held not strong enough to outweigh a long history of state regulation expressly permitted by the Natural Gas Act).

crimination cases which do not involve conflicts at all. See discrimination cases, *supra* p. 18.

2. The mere logical possibility of conflict or dual regulation is a significant factor weighed by this Court in invalidating state regulation where interstate commerce requiring uniform regulation is involved. *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 773-75 (1945); *Edwards* v. *California*, 314 U. S. 160, 176 (1941); *South Covington Ry.* v. *Covington*, 235 U. S. 537, 547-48 (1915); *Hall* v. *DeCuir*, 95 U. S. 485, 489 (1877); see also *United Air Lines, Inc.* v. *Illinois Commerce Commission*, 32 Ill. 2d 516, 207 N.E. 2d 433, 438 (1965).

3. There is a strong probability of conflicting or dual regulation of baseball by other states than Wisconsin if this litigation is successful. The general popularity of professional baseball makes such a result almost inevitable. The competition for teams involving Atlanta, Milwaukee, Boston, Cleveland and Kansas City (Ex. 150-1, 441, 490; R. 3827-9) is evidence enough of this popularity as is the very pendency of this litigation. Further evidence is the interest of other cities in new Major League franchises, as shown by petitioner's evidence at trial (Ex. 24; R. 3239). The likelihood of conflicts is ably analyzed by the Wisconsin Supreme Court (App. 38a-39a) which recognized that "it may be doubted that a state will be objective" in dealing with the distribution of available franchises throughout the country.

2. The decision below will not frustrate state antitrust enforcement against other industries engaged in interstate commerce.

The petition seeks to enlarge the implications of the decision below to make it appear that the decision will have crippling effects on state antitrust enforcement

generally. It talks of "far reaching and disturbing implications" of the decision and calls it a "formidable obstacle" to state antitrust enforcement (Pet. 17). The risks are illusory.

The Wisconsin decision is confined to "a particular industry", baseball (App. 36a), with a unique antitrust status (App. 24a, 31a). As emphasized by this Court in *Radovich*,[29] the federal antitrust immunity recognized in *Toolson* is carefully restricted to baseball and no other business has such an adjudication. In view of the clear limitation of the decision below and of *Toolson* to baseball, petitioner's argument that the Wisconsin decision would frustrate state antitrust enforcement generally is completely unfounded.

The Wisconsin Supreme Court has not been hesitant in the past in applying Wisconsin's antitrust laws to interstate businesses, including the interstate chemical industry[30] and the interstate petroleum industry,[31] notwithstanding claims that such application unduly burdened interstate commerce and conflicted with the federal antitrust laws.

The decision below guarantees continued viability of state antitrust laws generally, saying:

> "The state may, ordinarily, protect the interests of its people by enforcing its antitrust act against persons doing business in interstate commerce, but then, ordinarily, the federal government has an antitrust policy like that of the state." (App. 26a.)

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29. 352 U. S. 445, 450-52.

30. *State* v. *Allied Chemical & Dye Corp.*, 9 Wis. 2d 290, 101 N.W. 2d 133 (1960).

31. *State* v. *Texaco, Inc.*, 14 Wis. 2d 625, 111 N.W. 2d 918 (1961).

3. The case does not involve preemption.

Asserting that the decision below was based on "preemption", petitioner makes much of what it calls "an extraordinary concept of preemption" of state power by a "judicial exemption" from the federal antitrust laws (Pet. 19-25). In fact, the decision never mentions "preemption," a doctrine limited to situations where a pervasive Congressional statutory scheme of regulation precludes local regulation of the same subject. *E.g., Pennsylvania* v. *Nelson;* 350 U. S. 497 (1956) (Smith Act).

Petitioner also asserts an inconsistency between baseball's immunity from state antitrust regulation and court decisions which the plaintiff contends hold that federal statutes exempting certain activities of labor organizations from the federal antitrust laws do not exempt those activities from state antitrust laws (Pet. 19-23). Those decisions do not support the proposition for which they are cited.[32] Moreover, there is an obvious distinction between

32. *Carpenters Union* v. *Ritter's Cafe,* 315 U. S. 722 (1942) and *Giboney* v. *Empire Storage & Ice Co.,* 336 U. S. 490 (1949) both concerned a purely local "stranger picketing" question where the complaining party had no labor dispute with the union. As this Court said in *Giboney,* the unions were challenging the "traditional powers of the states over their domestic economy." 336 U. S. at 497. No question of inconsistency with federal policy or undue burden on commerce was even raised by the defendant unions which argued only that their right to free speech had been abridged. The federal policy which was at issue and which this Court examined in *Hanna Mining Co.* v. *Marine Engineers;* 382 U. S. 181, 189-91 (1965), affirmatively supported the coverage of supervisory employees by state law since they had been expressly removed from the preemptive shelter of the federal law by Congress. In *Commonwealth* v. *McHugh,* 326 Mass. 249, 93 N.E. 2d 751 (1950), *cert. denied,* 340 U. S. 911 (1951), the labor organization's price fixing efforts were successfully prosecuted under both Massachusetts and federal law (*McHugh* v. *United States,* 230 F. 2d 252 (1st Cir. 1956)); and in *Mayer Bros. Poultry Farms* v. *Meltzer,* 274 App. Div. 169, 80 N.Y.S. 2d 874, *appeal denied,* 274 App. Div. 877, 83 N.Y.S. 2d 228 (1st Dept. 1948), the New York court found that no labor dispute was involved.

the subject matters of baseball and labor. The states have traditionally regulated certain local activities of labor organizations under their police power and have zealously and successfully sought to preserve their power in this area. Prior to this case, no state had ever regulated organized baseball's activities under state antitrust laws during its century-long history.[33]

Petitioner further states (1) that the federal antitrust law does not preempt state law but operates concurrently with it (Pet. 19-20) and (2) that national policy through operation of the Commerce Clause cannot preempt state antitrust laws (Pet. 24-25). Of course, concurrent federal-state jurisdiction is permissible, provided that the state regulation is consistent with national policy—not in opposition to it[34]—and the subject regulated by the state is not one requiring uniform national regulation under the Commerce Clause, the imperatives of which cannot be frustrated by misapplied notions of preemption.

Moreover, all of the concurrent jurisdiction cases cited by the petitioner (Pet. 19) involved businesses being carried on within the regulating state. No case is cited in which state power to regulate a business conducted wholly outside its borders is upheld or even claimed. But here, where only one of the ten National League clubs was ever a Wisconsin resident and all of the respondents have discontinued their activities in Wisconsin, they would be

33. *Cf. United States* v. *South-Eastern Underwriters Ass'n*, 322 U. S. 533, 548-49 (1944) (long history of state insurance regulation recognized as strong reason for upholding such regulation in the absence of conflict with Congressional action).

34. *Sears, Roebuck & Co.* v. *Stiffel Company*, 376 U. S. 225, 231 (1964). (Illinois unfair competition law clashes with federal objectives when applied to articles unpatentable under federal patent laws).

compelled by the judgment of the trial court to come back and resume their activities and submit to continued regulation under the antitrust law of that state. This is unprecedented.

4. Petitioner's contention that national policy permits the application of state antitrust laws to organized baseball is erroneous.

Petitioner argues that if there is a national policy pertaining to baseball, it permits the application of state antitrust laws to baseball (Pet. 25-30). This argument is based on the outmoded concept that the organized baseball business is a local affair.[35] Petitioner relies principally on *American League Baseball Club* v. *Chase*, 86 Misc. 441, 149 N. Y. Supp. 6 (Sup. Ct., Erie County 1914), and cites it for the proposition that baseball is subject to state antitrust law.

But *Chase* did not hold that baseball was subject to the New York antitrust law and did not mention that law. In a later New York case, *American League Baseball Club* v. *Pasquel*, 187 Misc. 230, 234, 63 N.Y.S. 2d 537, 540 (Sup. Ct., N. Y. County 1946), cited in the petition (p. 28),[36] the court noted that what was held in *Chase* was that the player contract there involved was not enforceable for lack of mutuality as a matter of contract law and that what *Chase* said regarding monopoly was only dictum.

35. Petitioner bottomed its argument below on the claim that baseball is local and intrastate in character and is not a part of interstate commerce. This discredited claim continues to underlie substantial portions of the petition (Pet. 16, 25-30).

36. Petitioner incorrectly states that the injunctive relief sought in *Pasquel* was denied (Pet. 28, n. 31). A temporary injunction against tampering with players under contract was issued.

That *Pasquel* opinion and the subsequent *Pasquel* opinion (188 Misc. 102, 66 N.Y.S. 2d 743), also cited in the petition (Pet. 28), plainly declared the New York antitrust law inapplicable to baseball.

Contrary to petitioner's statement (Pet. 28) that the 1952 House Report recognized *Chase* as a precedent for state antitrust regulation of organized baseball, the report cited *Chase* only in its discussion of contract enforcement which it distinguished from the antitrust question[37] and said with respect to the latter that "organized baseball is not amenable to effective state regulation."[38]

Petitioner also asserts that baseball has not relied upon immunity from state antitrust law and therefore should not have the benefit of such an immunity (Pet. 30-32). Whether or not baseball has relied on such an immunity is beside the point, where, as here, the attempted regulation violates the Commerce Clause and national policy. The immunity confirmed in *Toolson* would become meaningless if the baseball structural arrangements were made subject to varying state antitrust laws with their "differing standards for decision" as recognized by the court below (App. 39a). Moreover, no state in the nearly 100-year history of professional baseball in the United States has ever sought to regulate those aspects until now, including Wisconsin, where for most of the past century organized baseball (both major and minor) with its characteristic structural arrangements has operated without state antitrust regulation of its affairs.

37. 1952 House Report at 127, 129.

38. *id.* at 7.

Conclusion

The petition for a writ of *certiorari* should be denied.

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